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IN THE

Supreme Court of the United States

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF FOR THE MASSACHUSETTS CHAPTER OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The issue before this Court—whether the Takings Clause of the Fifth Amendment to the United States Constitution precludes states[1] from advancing the public welfare through the power of eminent domain when the land taken will be used for a private development project—has profound implications for property owners, real estate developers and the public.

The National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") is an association of over 900 professionals and organizations in Massachusetts, large and small, with an interest in the responsible ownership, development, management and financing of properties throughout the Commonwealth.[2] NAIOP is actively involved in the process affecting legislation and regulations concerning zoning, permitting and all other aspects of land use controls throughout Massachusetts. NAIOP's long and continuing experience with land use laws and regulations, and the perspective that experience brings, enables it to speak broadly and with depth on land use and related public policy issues.

As an entity whose membership includes property owners, NAIOP has an interest in ensuring that the government (federal and state) does not exercise its eminent domain

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[1] As used herein, "states" includes states and their subdivisions, such as municipalities.

[2] By letters on file with the Court, counsel for petitioners and counsel for respondents provided their consent to the filing of any amicus brief in this case. Pursuant to Supreme Court Rule 37.6, NAIOP states that counsel for a party did not author this brief in whole or in part and that no person, other than NAIOP, its members and counsel, made a monetary contribution to the preparation or submission of this brief. The undersigned counsel note that members of their law firm, Goodwin Procter LLP, represent Corcoran Jennison, which is not a party to this proceeding but is the project developer of the development contemplated in *Kelo*.

power in an arbitrary manner and that property owners are justly compensated to the extent their property is properly taken. NAIOP is aware that condemnations may be controversial, and believes that they should only be used sparingly.

As an entity whose membership includes real estate developers and professionals involved in real estate development, NAIOP is also well aware that modern real estate development projects have the potential substantially to advance the public welfare through, among other things, providing places .o live and work; improving safety, aesthetics, and quality of life; increasing employment; and expanding the tax base.

NAIOP supports the ability of state and local governments to exercise the power of eminent domain, as a tool of last resort, to enable development projects to proceed in those communities that have decided to facilitate the projects for purposes of advancing the public welfare.

SUMMARY OF THE ARGUMENT

NAIOP focuses on rebutting the assertion of the Property Rights Foundation of America, Inc. ("PRFA") that the Takings Clause precludes states from promoting the public welfare by transferring taken property to private parties for the purpose of economic development. *See generally* Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners ("PRFA Br."). PRFA's assertion cannot prevail because (1) this Court has held that taken property may be transferred to private parties to further the public welfare; and (2) real estate developments like the one in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004)[3] further the public welfare even more

[3] Both the *Kelo* Court and the dissenting judges agreed that property may be taken and transferred to private parties to further the public welfare. 843 A.2d at 531; *id.* at 576 (Zarella, J., concurring in part and dissenting in part).

substantially than do uses that this Court has found sufficient to satisfy the "public use" requirement. NAIOP does not address some of the other issues implicated by this appeal, such as the level of scrutiny that courts should apply to legislative determinations concerning the public welfare.

Throughout this nation's history, states have had the power to promote the public welfare through a variety of means, including eminent domain. The plain language of the Takings Clause, its legislative history, and the larger historical context surrounding the Clause demonstrate that duly constituted legislatures were presumed to have the authority to exercise eminent domain to advance the public welfare so long as they paid "just compensation" to those from whom they took the property.

Further, although state courts have developed various interpretations of "public use" as used in their respective state constitutions and the United States Constitution, this Court has never construed the Takings Clause in a manner that would prevent a state from exercising its eminent domain power by providing land to a private party in order to further the public welfare. To the contrary, this Court has stated that a narrow "public use" test is inadequate,[4] that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment,"[5] and that "public use" means "public welfare."[6] This Court has upheld takings that transferred property from one private party to another.[7] Moreover, this Court has stated that the eminent domain power is "coterminous with the scope of a sovereign's police powers."[8]

[4] *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906).

[5] *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923).

[6] *See Berman v. Parker*, 345 U.S. 26, 32-33 (1954).

[7] *See id.*; *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

[8] *See Midkiff*, 467 U.S. at 240.

As demonstrated through two recent real estate development projects in the City of Boston, Massachusetts that involved the use of eminent domain and the transfer of taken land to private parties, modern, large-scale development projects, like the one in *Kelo*, have the ability to further the public welfare in a variety of important ways, such as by providing places to live and work; improving aesthetics and community safety; revitalizing the economy; increasing community identity and pride; providing additional goods and services, housing and retail; and adding jobs, including construction and permanent jobs. Development projects can also assist in uniting communities by providing public space that can be used for community meetings and by organizations that provide community services. And, development projects may increase tax revenue, a benefit that should not readily be discounted because taxes support the very pillars of the public welfare, such as schools, police, fire departments, sanitation, and other services.

The Takings Clause places only two limitations on the eminent domain power: (1) the government may only exercise the power to further the public welfare, and (2) the government must pay "just compensation" when it takes property. Nothing prevents states from restricting this power further. But this Court should not rewrite the Takings Clause to place further restrictions in the Constitution.

ARGUMENT

I. The Fifth Amendment's Plain Language, Its Legislative History and Historical Context Do Not Support PRFA's Construction.

The history surrounding the Fifth Amendment sheds light on its purpose.[9] "[B]oth the colonial and confederation governments made extensive use of the power to expropriate property for all manner of social and economic ends, many of which involved the transfer of land from one private party to another,"[10] and "[t]here was little disagreement that these uses were public and that eminent domain could be used in their assistance."[11]

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[9] PRFA relies heavily on *City of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). PRFA Br. at 2, 8, 18-19. *Hathcock* is inapposite because, among other reasons, it involved the construction of the Michigan constitution's public use clause. *See* 684 N.W.2d at 785-86. The history behind that provision, which the Court discusses in depth, is very different from the history behind the Fifth Amendment's Takings Clause. *See id.* at 779-83 (discussing history behind Michigan provision).

In construing the federal provision, it is appropriate to look to the intent of the framers of the Takings Clause as opposed to the intent behind the Fourteenth Amendment, which made the Takings Clause applicable to states, because "passage of the Fourteenth Amendment does not reflect a separate consideration of what specific property interests needed protection from the government. . . . The period in which the Fifth Amendment's Takings Clause was proposed and ratified is the only time at which the nation considered which property rights needed protection from the government." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 862 (1995).

[10] Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1253 (2002); *see also* 2A J. Sackman, Nichols on Eminent Domain (rev. 3d ed. 2004), § 7.01[3] ("Eminent domain was employed quite extensively in the colonial and early America for purposes including but not limited to mills, private roads, and the drainage of private lands.").

[11] 2A Nichols, *supra* note 10, at § 7.01[3].

The understanding that a duly constituted legislature had broad power to advance the public welfare – through eminent domain as through other means – was consistent with the "republican" concept that predominated during the American Revolution and remained influential thereafter.[12] Benjamin Franklin succinctly captured republican sentiment: "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing . . . ."[13]

Over the course of the American Revolution and the period of the Articles of Confederation, James Madison and others grew skeptical of pure republican principles, and became increasingly concerned with the tyranny of legislative majorities.[14] Madison grew particularly concerned with potential infringements on property rights.[15] Madison,

[12] *See* Treanor, *supra* note 9, at 818 ("republicanism, which values the right to property but subjects it to majority delineation, was . . . extremely influential"); *id.* at 825 ("Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections – land could be taken only with the consent of the individual or of the legislature.").

[13] Treanor, *supra* note 9, at 824-25 (quoting Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), *in* 10 The Writings of Benjamin Franklin 54, 59 (Albert H. Smyth ed., 1907)).

[14] *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) *in* The Writings of James Madison at 30 (Gaillard Hunt, ed. 1904) ("It remains then to be enquired whether a majority having a common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority."); *see also* The Federalist No. 10, at 16-23 (James Madison) (R. Fairfield ed., 2d ed., 1966).

[15] *See* 2 Records of the Federal Convention of 1787, at 203-04 (Max Farrand ed., 1911) ("In future times a great majority of people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . ."); (footnote omitted); The Federalist No. 10, *supra* note 14, at 18 ("[T]he most common and durable source of factions has been the

therefore, designed the Constitution and the bill of rights to provide, among other things, some protection to legislative minorities without entirely subverting republican principles.[16] With respect to the eminent domain power, Madison achieved this by inserting the "just compensation" requirement.

The "just compensation" requirement, which legislatures had not universally applied before Madison drafted the Takings Clause,[17] forces the government, in any given instance, to consider more carefully whether to exercise the eminent domain power and minimizes the risk that a legislative majority will arbitrarily exercise it to confiscate and redistribute the property of a legislative minority.[18] It also

various and unequal distribution of property. Those who hold, and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation . . .") (footnote omitted).

[16] *See* Gordon S. Wood, The Radicalism of the American Revolution 230-32, 327 (1993).

[17] Harrington, *supra* note 10, at 1268 ("it was left to Parliament to determine . . . whether fairness required some value for the taking"); *cf.* Treanor, *supra* note 9, at 785 ("In colonial America, government routinely acted in ways that affected private property, and the political process determined when compensation was due. No judicially enforceable compensation requirement existed during this period. . . . Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment."); *id.* at 825 ("The constitutionalization of the compensation requirement . . . reflects a break from . . . republican tradition. In certain circumstances, compensation was now mandated and no longer a matter to be determined by majoritarian deliberations. . . . Thus, the story of the rise of the compensation requirement accords with historical accounts of revolutionary era ideology. As the revolution era progressed, people lost faith in legislatures and liberal ideas became increasingly prevalent.").

[18] *See* Harrington, *supra* note 10, at 1297 ("[T]he compensation

ensures that condemnees do not bear a disproportionate burden in promoting the public welfare. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

But neither Madison's original draft of the Takings Clause ("[n]o person shall be ... obliged to relinquish his property, where it may be necessary for public use, without a just compensation"[19]) nor the final version, which was passed without any recorded debate[20] ("nor shall private property be taken for public use, without just compensation"[21]), purports to raise any other impediments to the furtherance of the public welfare. Had Madison or those who edited the Takings Clause intended to confine more radically the eminent domain power, such as by preventing the legislature from transferring taken property to a private party for the purpose of furthering the public welfare,[22] they surely would have said so in a less

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clause was protective of minority rights, and thus satisfied federalist fears that a landless majority might gain control of the national legislature and impose confiscating regulations on property in the way state legislatures had done during the confederation."); Treanor, *supra* note 9, at 878 ("Although its only literal legal effect was to require the federal government to compensate when it physically took property, the Takings Clause also stood as a statement of the principle that both the state and federal government should refrain from acting in a way that arbitrarily redistributed wealth.").

[19] 4 Documentary History of the First Federal Congress: Legislative Histories at 10 (Charlene B. Bickford & Helen E. Veit eds., 1986).

[20] *See* Treanor, *supra* note 9, at 791.

[21] U.S. Const. amend. V

[22] The change would have been radical because it would have gone beyond the protections afforded by the "just compensation" language and would have enabled a minority of one to thwart the will of the many in an important category of cases. *See* Harrington, *supra* note 10, at 1300-01 ("Such a limit would have been a monumental alteration in the nature of representative government as understood by the members of the founding generation. That is to say, read as a limit on the power of expropriation, the term "public use" would effectively change the relationship of Congress as a representative institution to the body politic, thereby preventing Congress from giving consent in an important category of cases.").

ambiguous fashion. This is particularly true given that none of the state ratifying conventions requested the Takings Clause, indicating that there was little desire to alter the eminent domain power as it was then understood.[23]

II. This Court Has Construed "Public Use" Broadly.

This Court's decisions reflect an increasing recognition over time that the term "public use" is consistent with "public welfare," and that "public welfare" includes all the things that large real estate development projects enhance (such as design of the urban environment, housing, jobs, the economy, and community identity, to name a few).

A. This Court Has Not Held That the Takings Clause Precludes States from Taking Property and Transferring It to Private Parties To Further the Public Welfare.

The eighteenth and nineteenth century Supreme Court cases to which PRFA cites support the proposition that legislatures may not use eminent domain to transfer property from one private party to another for the sole purpose of benefiting the latter, but they do not address whether such a transfer may be made *for the purpose of advancing the public welfare*. *See, e.g., Vanhorne's Lessee v. Dorrance*, 2 Dall. (2 U.S.) 304 (1795); *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798); *Wilkinson v. Leland*, 2 Pet. (27 U.S.) 627 (1829); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896). *Missouri Pac. Railway Co.* is also distinguishable because it marked the first and last time that the Court ever reversed a state supreme court's decision that a physical taking was for a

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[23] Treanor, *supra* note 9, at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government. Indeed, none of the state ratifying conventions requested a just compensation clause or a contract clause binding on the federal government."); *see also id.* at 791 ("State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights *except the Takings Clause*.") (emphasis added).

"public use."[24]

B. This Court Has Equated "Public Use" with Public Welfare.

In *Head v. Amogkeag Manufacturing Co.*, 113 U.S. 9 (1885), the Court addressed a taking under New Hampshire's Mill Act. The owner of land adversely affected by a private mill owner contended that the Mill Act, which authorized the private mill owner to construct a dam that flooded the landowner's property (provided the mill owner compensated him), violated the Fourteenth Amendment. *See id.* at 15-16. Although PRFA correctly notes that the *Head* Court chose to sustain the taking based on law regarding the rights of riparian owners, PRFA Br. at 14, the importance of *Head* here is its focus on whether the legislature acted to advance the "public good." 113 U.S. at 21 ("[T]he manner in which the rights of proprietors and lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, *and to the public good*, is within the constitutional power of the legislature.") (emphasis added).

In *United States v. Gettysburg Railway Co.*, 160 U.S. 668 (1986), the Court upheld a taking by the federal government to preserve land involved in the Battle of Gettysburg, explaining as follows:

> "Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some or all of the powers granted by Congress must be valid." 160 U.S. at 681.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906), the Court upheld a condemnation wherein a

[24] *See* Lawrence Berger, *The Public Use Requirement In Eminent Domain*, 57 Or. L. Rev. 203, 213 (1978).

mining corporation condemned a right of way for an aerial bucket line across the condemnee's property. Utah's legislature had declared that the development of the mining wealth of the state was a public necessity (thus, the taking advanced a particular industry, mining). *See id.* at 530. The condemnee argued that the taking violated the Fifth Amendment because it was for a private purpose, but the Court disagreed:

> "In the opinion of the legislature and the Supreme Court of Utah the *public welfare* of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong." *Id.* at 531 (emphasis added).[25]

In *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), landowners contended that a municipality's condemnation of their land to construct a road that few people would use violated their rights under the Fourteenth Amendment. 262 U.S. at 706. The Court upheld the taking, reasoning that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of *public health, recreation, and enjoyment*." *Id.* at 707 (emphasis added); *see also id.* at 708 ("A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are

[25] *Strickley* also expressly rejected one of the narrow constructions of "public welfare," pursuant to which some courts focused on whether the public "used" the taken property. *Id.* at 531 (noting "[t]he inadequacy of use by the general public as a universal test."); *see also Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (same); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use.").

important to the *general health and welfare*: pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery.") (emphasis added).[26]

Thus, *Head, Gettysburg Railway Co.*, *Strickley*, and *Rindge* support the conclusion that states may exercise the eminent domain power to advance the "public good," "public welfare," "general health and welfare," and "public health, recreation and enjoyment."

C. *Berman* and *Midkiff* Conclusively Establish that Land Taken Pursuant to the Eminent Domain Power May Be Transferred to Private Parties in Order To Advance the Public Welfare.

Berman v. Parker, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), remove any doubt regarding whether the Takings Clause imposes a limitation – over and above the "just compensation" requirement – on the government's ability to advance the public welfare through eminent domain.[27]

In *Berman*, much of the land taken went to private entities.[28] The Court upheld the takings, stating that the

[26] The Court's comments that "public uses" are not "limited to matters of mere business necessity" and that they "need not be for the purpose of a business to create a public exigency," presume that takings for the "purpose of business" (and hence economic development) are valid.

[27] Although state law decisions are not particularly helpful given the Supreme Court authority directly on point, it is worth noting that the state law construing the Takings Clause narrowly, much of which arose in the nineteenth century concerning the mill acts, has been described as "irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification." Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L. J. 599, 606 (1949).

[28] 348 U.S. at 31 ("[I]t will be put into the project under the management of a private, not public, agency and redeveloped for private, not public, use."); *id.* at 33 ("Here one of the means chosen is the use of private enterprise for redevelopment of the area."); *id.* at 34-35 (The plan

eminent domain power is part of Congress's "police power," which encompasses "[p]ublic safety, public health, morality, peace and quiet, law and order." *Id.* at 32. The Court noted that the "public welfare" concept and "[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary," and that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. The Court stated that the rights of those whose property was taken "are satisfied when [the owners] receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36.

PRFA suggests that *Berman* is distinguishable because Congress's use of eminent domain was "'merely the means to the end' of addressing the social problems that were within the scope of the state's police powers to address." PRFA Br. at 17. However, the same situation exists in *Kelo*: the state attempted to promote an economic development project to cure many of the ills that resulted from the area's depressed condition.

Moreover, the *Berman* rationale is not confined to the context of "blight," as not all of the taken property in *Berman* was blighted in any meaningful sense.[29] Additionally, the Court's analysis did not hinge on whether blight technically existed, but instead focused on whether the takings advanced the public welfare by improving the surrounding community.[30] Nothing in the Takings Clause suggests that

for the condemned property included "not only new homes but also schools, churches, parks, streets, and *shopping centers*.") (emphasis added).

[29] *Id.* at 31 ("It is not used as a dwelling or place of habituation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that the property may not be taken constitutionally for this project. It is commercial, not residential property; it is not slum housing . . . .").

[30] *See id.* at 35 ("it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Among the

legislatures have the authority to improve the "physical, aesthetic [and] monetary condition" of "blighted" areas only. Indeed, without adequate planning and appropriate governmental intervention – financial or otherwise – many decent areas may become blighted.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the statutory scheme's main purpose was to transfer land from one small group of private property owners to another larger one. 467 U.S. at 232-33. The Court of Appeals for the Ninth Circuit held that the Act violated the Takings Clause because it was "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Midkiff v. Tom*, 702 F.2d 788, 798 (9th Cir. 1983).[31]

This Court, however, reversed the Ninth Circuit, stating that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. The Court also noted that "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose," *id.* at 243-44; that "what in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair;" *id.* at 244 (quoting *Block v. Hirsh*, 256 U.S. 135 (1921)); and that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause," *id.* at 241.

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reasons that *Hathcock*, *supra* note 9, is inapposite here is that it *reversed Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), which had applied *Berman's* rationale in construing the eminent domain power. In doing so, *Hathcock* noted that *Berman* did not apply to Michigan's construction of its State Constitution. 684 N.W.2d at 785-86.

[31] *See also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) ("In both *Midkiff* and *Berman*, as the present case, condemnation resulted in the transfer of ownership from one private party to another . . . .").

The Court also reiterated the instruction, contained in *Berman*, that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 240 (quoting *Berman*, 348 U.S. at 33); *see also id.* at 244 ("[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

Despite PRFA's suggestion to the contrary, PRFA Br. at 19, the clear language of *Midkiff* reveals that its rationale is not limited to situations where oligopolies exist,[32] and that states may transfer taken property to private parties where doing so furthers the public welfare.

III. Modern Real Estate Development Projects Promote the Public Welfare.

Berman and *Midkiff* held that the government can use eminent domain to achieve an "object . . . within [its] authority," and that furtherance of the public welfare is within its authority. *Berman*, 348 U.S. at 33; *Midkiff*, 467 U.S. at 240.[33] As discussed below, modern real estate developments advance the public welfare in several important ways.[34]

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[32] The Takings Clause does not state or imply that the elimination of oligopolies is more important to the public than are other public benefits, and there is no legitimate basis in the Constitution for a rule that (1) prohibits takings involving the transfer of property to private parties for the purpose of advancing the public welfare generally, but (2) affords exceptions in the case of oligopolies and, as in *Berman*, blight.

[33] It is worth noting that zoning is one of the states' police powers, *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and that modern zoning often seeks to encourage private developments for the purpose of improving the quality of life. *See generally* E. H. Ziegler, Rathkopf's The Law of Zoning and Planning § 1.2 and § 15:10 (2001). If real estate development may properly be deemed to further the public interest in the context of zoning, then it must do so in the context of eminent domain. *See* Nichols, *supra* note 10, at §§ 7.03[8][d], pp. 7-56 to 7-57 ("case law regarding the police power may help clarify what a valid pubic use is for the sake of eminent domain").

[34] Even petitioners acknowledge that economic development may be

A. Recent Examples of Successful Developments in Boston, Massachusetts Involving the Use of Eminent Domain and the Transfer of Taken Land to Private Parties

Although there are numerous real estate developments in Massachusetts that have substantially furthered the public welfare, two specific, recent examples of projects that involved use of the eminent domain power in Boston illustrate the ways in which these projects benefit the public.

1. The Metropolitan Building in Boston's Chinatown

In 2002, the Boston Redevelopment Authority ("BRA"), a public entity established by the Boston City Council and Massachusetts Legislature with broad development authority (including the power to buy and sell property and the power to acquire property through eminent domain), exercised its eminent domain power to assemble a full city block of just under one acre for the construction of "The Metropolitan." This project resulted in a 23-story building in Boston's Chinatown neighborhood that houses 253 residential units, an underground parking garage, and ground floor space for commercial uses as well as for not-for-profit organizations providing social services to Chinatown residents in the areas of housing, youth and family services, and economic development.

Occupancy of The Metropolitan commenced in early 2004. In addition to the aforementioned benefits, the BRA,

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a valid public policy goal. *See* Pet. Br. at 11 ("This case is not about whether economic development is a valid public policy goal... Government may pursue tax revenue and economic development ..."). Additionally, in *Hathcock*, *supra* note 9, the Michigan Supreme Court, which construed its "public use" clause differently than does this Court, recognized that real estate developments further the public welfare. *Hathcock*, 684 N.W.2d at 778 ("There is ample evidence in the record that the [proposed development] would benefit the public.").

through a land disposition agreement with the private developer, has ensured realization of the following public benefits: (1) at least 81 of the 133 rental units at the project must be rented to households earning less than 60% of the Boston area median income (and 11 of such rental units must be targeted to formerly homeless persons); (2) at least 34 of the 118 residential condominiums at the project have been sold to households earning between 80% and 120% of the Boston area median income, and such units are restricted as affordable housing for a term of fifty years; (3) the project includes an approximately 8,500 square foot courtyard that is open to the public; and (4) the developer is required to convey to the BRA two condominium units for community use. The project also includes construction of a 23,000 square foot building to house another social services organization that formerly occupied a building on the site.

In addition to all of these public benefits, The Metropolitan will also result in additional tax revenue for Boston, improve the neighborhood aesthetically, and add 253 first class housing units to Boston's housing stock—particularly in Chinatown, one of Boston's most densely populated neighborhoods.

2. The South Boston Convention Center and Hotel Complex

Eminent domain was also used in the development of the Boston Convention and Exhibition Center complex ("Convention Center and Hotel Complex"), a $750 million project consisting of 1.7 million square feet of convention and exhibition space and a new privately-owned hotel on a 60-acre parcel of land. A special act of the Massachusetts legislature, Chapter 152 of the Acts of 1997, authorized the project. All of the taken land was acquired at the same time, and some of it was transferred to the private owners of the hotel, which is an integral part of the complex.

The Convention Center and privately owned Hotel provide numerous public benefits, over and above additional

tax revenue, to the South Boston community in which they are located and to the City of Boston overall. The site, which was previously comprised of underutilized industrial and office space, vacant lots, and surface parking areas, has been transformed into a vibrant and prospering area. Coupled with billions of dollars of public infrastructure improvements to the area, including creation of a new mass transit Silver Line and the Third Harbor Tunnel, the Convention Center and Hotel Complex is helping to solidify the area's new identity as a place in which to live and work. The conventions and trade shows that will come to the area as a result of the project will also bring new income into the community when attendees eat in Boston restaurants, shop in retail stores in the City's neighborhoods, and take advantage of other private and public facilities.

B. The Type of Public Benefits that Arise from Modern Real Estate Developments Are Sufficient To Justify the Use of Eminent Domain.

PRFA suggests that construction jobs and increased tax revenue alone cannot "be a sufficient basis for public use," PRFA Br. at 18, but that does not properly credit all the benefits expected to flow from the *Kelo* development project. Indeed, as noted below, the public benefits that result from large private developments like the one in *Kelo* and those discussed above are similar to, but even more broad and dramatic than, ones that resulted from uses that have validated takings in the past.

While grist mills may have improved the ability of farmers to grind grain and make it publicly available and while the aerial mining bucket in *Strickley* helped an industry that the state deemed important, modern developments often promote and facilitate numerous businesses (in *Kelo*, the businesses include not only high technology, but also commercial fishing, offices and retail shops).

The memorial in *Gettysburg Railway Co.* may have inspired members of the public to feel pride in their country,

the road that was to be available to a precious few people in *Rindge* may have preserved or enhanced the "natural scenery," and the urban renewal project in *Berman* may have improved the "physical, aesthetic [and] monetary condition of the city." Modern development projects such as *Kelo* (and The Metropolitan and the Convention Center and Hotel Complex, discussed above) have the capacity to do precisely the same things and positively impact even more members of the public, regardless whether placed in areas that technically have been deemed "blighted."[35]

The *Midkiff* takings were effectuated to improve the prospect of private home ownership. Modern real estate developments, like the one in *Kelo* (and The Metropolitan in Boston, discussed above), often involve a substantial number of residential units, many of which may be reserved for low and moderate income individuals, which will help alleviate housing shortages and, by attracting residents with a stake in the community, lead to other improvements as well, including increased support for commercial, retail and cultural uses in the neighborhood.

Although PRFA may have a point that tax revenue should not necessarily be a sufficient basis, standing alone, to justify use of the eminent domain power, *see* PRFA Br. at 18, the

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[35] Also, the *Kelo* project involves elements that will be available for use by all interested members of the public, including a public walkway and marina (as noted above, The Metropolitan (with its courtyard) and the Convention Center and Hotel Complex (with its improvements to the transportation system and Third Harbor Tunnel), contain similar elements). Indeed, the *Kelo* project is designed to "encourage public access to and use of the city's waterfront." 834 A.2d at 509. Such features are common in modern developments. Further, while it "is not essential that the entire community or even a considerable portion, . . . directly enjoy or participate in any improvements," *Midkiff*, 467 U.S. at 244 (quoting *Rindge*, 262 U.S. at 700), it is noteworthy that things like housing, retail shops and hotels, while privately owned, are available to the "public" in a meaningful sense, as the public consists of private individuals who benefit from the availability of such resources.

benefits from increased tax revenue are substantial. Increased tax revenues can have a ripple effect, as they may enable communities to improve the quality of life of its citizens in a host of ways, including improved schools, police, fire departments, and sanitation.

In any event, when it comes to many modern development projects – like the one in *Kelo* and the two Boston projects discussed above – it is not simply the increased tax revenue that furthers the public welfare, it is also such public benefits as the improved housing, retail services, hotel space, public recreation areas, business environment and urban design that are directly connected to the projects. These benefits raise any private aspects of the development to "the class or character [of] a public affair." *Midkiff*, 467 U.S. at 241 (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)).

C. Eminent Domain Is an Important Tool with Which States May Further the Public Welfare.

Whether a taking is for a private development or for a highway, the people whose property is taken may not like the fact that they have to part with it, even with the compensation they receive, and may honestly (and perhaps with some legitimacy) believe that the public could do without the use or could do just as well if the use were relocated. If such individuals could effectively bar the state from exercising eminent domain by steadfastly refusing to sell their property,[36] the state's ability to improve the public welfare in the manner the states deem appropriate would be substantially

[36] There may be several reasons why a property owners would refuse to sell for "just compensation" if given the opportunity to do so, including that the owner (1) wants to extort an exorbitant price; (2) has a sentimental attachment to the property; (3) wants to stop the project for selfish reasons; or (4) wants to stop the project because owner believes it is not in the public interest. Because the result is the same regardless of the property owner's motive – the public interest as determined by the state is thwarted – the property owner's reasons for not accepting "just compensation" are irrelevant.

diminished. This is no less true for real estate development projects than it is for highways or any other use.

As the two Boston examples discussed above help demonstrate, it is often the case that important development projects could not proceed, or could not provide the full range and scope of public benefits that they are capable of providing, if states could not exercise their eminent domain powers to facilitate them. For instance, at the time the BRA assembled the land for The Metropolitan, the project site comprised ten different parcels of land.[37] Through eminent domain, the BRA was able to condemn out ancient passage rights that had been created in the 19th century and hampered the redevelopment of the project site through the ordinary operations of private enterprise.

Similarly, to build the 60-acre Convention Center and Hotel Complex discussed above, an affiliate of the City of Boston had to acquire vacant and underutilized office and industrial space, relocate tenants, and demolish existing structures, for the Convention Center and for the privately owned hotel. Nearly 100 tenants were relocated and over 50 separately owned public and private parcels were taken and consolidated to provide the necessary parcel of land. Development of this magnitude and significance in the South Boston neighborhood would not have been possible through ordinary private development because of the difficulty of creating such a large site in a downtown district.

The facts differ in every case. But if states could not exercise the power of eminent domain to facilitate private developments that will result in the same kinds of public

[37] The fact that a single acre of land encompassed ten different parcels shows that, in congested urban environments such as those in many northeast cities, numerous property interests can be at issue with respect to any significant development project. This increases the chances that at least one person will refuse to sell, and makes it all the more important that the state have the power to exercise eminent domain to further the public welfare.

benefits that flowed from takings that this Court has sustained, then a small minority could trump the greater welfare of the many. The Takings Clause was not intended to permit that result, and this Court has never so construed it. Nor should this Court do so now.

CONCLUSION

For the foregoing reasons, NAIOP respectfully submits that, while states are free to impose additional restraints on their eminent domain power, the Fifth Amendment's Takings Clause does not preclude states from using eminent domain to transfer land to private parties for the purpose of furthering the public welfare by facilitating private real estate developments, provided "just compensation" is paid.

Respectfully submitted,

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